

**STATE OF CALIFORNIA**  
**DGS Natural Gas Services Program**  
**Gas Services Agreement – Version 03/04**

This Gas Services Agreement, hereinafter called “Agreement” or “GSA”, between the State of California, acting by and through the Department of General Services, Natural Gas Services program, “DGS”, and **City of Sunnyvale, WPCP**, hereinafter called “Participant”.

**1. Definitions:**

- 1.1 DGS Commodity Cost:** the monthly cost of natural gas commodity purchased by DGS for the Participant. The cost shall be the actual cost incurred by DGS to acquire gas for Participant. If the Participant has one or more Special Purchases, the associated costs shall be included in the DGS Commodity Cost. A load management fee, if any, shall be considered part of the DGS Commodity Cost, but may be presented separately for the purposes of clarity.
- 1.2 DGS Fee:** \$.0065 per therm of gas delivered to the Participant, but not to exceed a maximum of \$27,000 per Account per fiscal year (running from July to June), subject to the right of DGS to decrease either sum. These costs are calculated in conformance with SAM 8752.
- 1.3 LDC:** the Local Delivery Company supplying natural gas transportation to the Participant’s meter(s). For the purposes of this Agreement, the LDC is: **Pacific Gas & Electric (PG&E).**
- 1.4 LDC Distribution Cost:** all costs and charges imposed by the LDC for natural gas transportation and related services on the distribution system to the Participant’s Account.
- 1.5 Interstate/ LDC Transmission Cost:** all costs and charges imposed by the LDC and/or any interstate pipeline (if such are separately charged or unbundled from LDC Distribution Costs) for natural gas transportation and related services for the transportation of the Participant’s requirements, prior to delivery to the LDC Distribution system. The costs will be actual costs incurred by DGS for this purpose.
- 1.6 Special Purchase:** any gas commodity, gas storage services, or gas transportation services purchased by DGS at the Participant’s request, as specified in Exhibit(s) SP, attached hereto and incorporated herein by reference. If there is a Special Purchase(s), the volumes or services in such Special Purchase(s) shall be deemed the first delivered to or used by the Participant.

**2. Term of this Agreement:**

The term of gas deliveries under this Agreement shall commence on **April 1, 2004** and shall terminate at 11:59 PM on: (Pick one and Initial)

\_\_\_\_\_ **June 30, 2005**

\_\_\_ **X** \_\_\_\_\_ **June 30, 2005**, but shall continue for additional 12-month fiscal year periods commencing on July 1 of subsequent fiscal years, unless terminated by either party effective as of June 30 of the then current fiscal year, by giving written notice to the other party on or before February 15 of that fiscal year.

\_\_\_\_\_ **June 30, 2008.**

### **3. DGS Natural Gas Services for the Participant:**

DGS shall, via contract(s) with gas supplier(s), arrange for the acquisition of gas commodity in accordance with applicable state law and LDC requirements, for the delivery of all the Participant's natural gas requirements for the Account(s) identified in Exhibit 1, attached.

- 3.1 DGS, or its authorized agents, will provide necessary nominations and scheduling arrangements with the LDC, subject to the LDC's capability to deliver gas to Participant and monitor gas deliveries to verify compliance by gas suppliers and the LDC with their contracts and tariffs.
- 3.2 DGS will provide Participant with detailed invoicing of costs and reporting of gas usage in a format suitable for auditing of the Participant's gas procurement account and an annual summary showing gas deliveries and costs.
- 3.3 When paid by the Participant, DGS will make payments, to the appropriate entities, of the DGS Commodity Cost, the DGS Fee, LDC Cost, and Interstate/LDC Transmission Costs and any special adjustments, as necessary, for Participant's requirements.
- 3.4 Subject to budgetary limitations, DGS plans to monitor, and where it deems necessary, participate in the California Public Utilities Commission and Federal Energy Regulatory Commission natural gas related proceedings. This is for the purpose of attempting to modify the impact of regulatory proposals and to provide information, advice, and additional assistance on any matters dealing with the gas supply for the Participant's Account(s). For example, if there are periods of shortage or curtailment, DGS will consult with the Participant on available options and strategies, with recommendations as to the possible courses of action that the Participant might want to consider.

### **4. Participant Obligations:**

- 4.1 The Participant agrees to purchase the requirements for the Account(s) listed in Exhibit 1 from DGS and to cooperate with DGS in the preparation of all applicable contract documents.
- 4.2 If direct electronic reading of the Participant's gas meter(s) is not available to DGS or its agents, the Participant agrees to provide DGS with regular information on the Participant's gas consumption, in a form and on a schedule (most likely on a weekly basis) as specified by DGS, when deemed necessary by DGS for gas control and scheduling functions.
- 4.3 Participant agrees to assist DGS in estimating monthly requirements amounts for Participant's Account(s) and approve estimates for use by DGS and DGS's supplier(s) in procuring and scheduling gas supply.
- 4.4 Participant agrees to notify DGS in advance whenever possible, or as soon as known, of any scheduled or unscheduled changes in operations that would significantly affect the estimated Requirements approved by Participant. This notice will allow DGS to modify the nominations or purchases on behalf of the Participant, thus avoiding extraordinary charges, costs or fees that might otherwise result. Unscheduled changes in operations should be brought to DGS's attention as soon as possible. Significant changes in operations would include, but not be limited to, shutting off of major equipment, scheduled or unscheduled outages, new facilities being added to the load, etc. Should the Participant fail to advise DGS of any changes in operations as soon as such

changes become known, and if there are extra costs to the DGS Program as a result, the Participant will be liable to DGS for any increased costs incurred.

- 4.5 Participant agrees to notify DGS of any changes in the Participant Contact Information given in Exhibit 1.

**5. Authorities and Agency Relationship:**

The Participant hereby appoints DGS as the Participant's agent for the term of this Agreement to coordinate the Participant's procurement of natural gas for the Account(s) described in Exhibit 1 and to execute such documents as are reasonably required by DGS, the LDC, or others in order to provide this commodity and services for the Participant. Participant hereby authorizes DGS, on behalf of Participant, to have LDC and any other utility or service provider to send to DGS all billing and usage records and all invoices for transportation, storage or balancing services relating to any and all gas meters located at the Participant's facilities. DGS is authorized on behalf of the Participant to pay to the appropriate entities, the DGS Commodity Cost, DGS Fee, LDC Cost, Interstate and LDC Transmission Costs and to make and pay any special adjustments, as necessary for the Participant's Requirements.

**6. Payment:**

DGS shall provide the Participant with monthly invoice(s) of the cost for natural gas service to the Participant Account(s) served under this Agreement. The invoice will specify the DGS Commodity Cost, DGS Fee, LDC Cost, Interstate/LDC Transmission Cost and any special adjustment(s), with supporting documentation. The DGS Commodity Cost, LDC Cost and Interstate/LDC Transmission Costs are 100% pass-through's from DGS to the Participant, based on costs incurred by DGS and/or Participant.

- 6.1 The Participant shall make payment directly to DGS no later than thirty (30) days from the date the invoice is received. If available, payment shall be made by state intrafunds transfer or electronic funds transfer. If such payment methods are not available, payment shall be by other means mutually agreeable to the parties that will ensure receipt of payment of the invoiced sums no later than thirty (30) days from the date the invoice is received.
- 6.2 Any discounts for prompt payment, if offered by and earned from the gas supplier, shall be applied to the Participant's bill, if earned.
- 6.3 Any interest charges incurred and paid by DGS according to Government Code 926.19 that are a direct result of late payment by Participant shall be passed through to Participant.

**7. Errors in Billing and Dispute of Payment Amount:**

- 7.1 **Errors:** If either DGS or the Participant determines or is advised that there is an error in the amount billed to the Participant, the other party should be notified immediately. Upon notification or discovery of any error, DGS shall review the bill for errors and calculate what correction needs to be made. DGS will incorporate any needed correction in the next invoicing cycle. Participant understands that DGS billings are based on the LDC's meter readings. As has occurred in prior periods, if as a result of meter reading or other adjustments from the LDC, DGS needs to acquire additional volumes of gas or incurs credits for excess volumes delivered in prior periods or fiscal years, said costs or credits will be passed through by DGS to the Participant.

- 7.2 Continued Performance:** Both DGS and the Participant shall continue to perform their respective obligations under this Agreement until such error or dispute of error is resolved as herein provided. The Participant agrees that full payment will be made for all DGS invoices, without reduction for any error or alleged error in billing. The Participant, at its discretion, may make payment of only the undisputed amount if (i) the amount in dispute is more than five (5) percent (%) of the total monthly invoiced amount or, (ii) the disputed amount constrains the Participant's end-of-year account close-out process.
- 7.3 Good Faith Resolution:** If there is a dispute between the Participant and DGS as to either (i) the existence of a billing error or (ii) the amount of a billing error, both the Participant and DGS shall endeavor in good faith to resolve any dispute concerning a bill by mutual agreement within thirty (30) days after the matter arises. If a settlement cannot be made within 30 days, either party may pursue whatever remedy it so chooses in law or equity.

## **8. Force Majeure:**

**8.1 Excuse of Performance:** Neither Party shall be liable to the other for failure to perform to the extent such failure was caused by Force Majeure. The term "Force Majeure" as employed herein means any cause not reasonably within the control of the party claiming suspension, as further defined in this section.

Force Majeure shall include, but not be limited to, the following: (i) physical events such as acts of God, landslides, lightning, earthquakes, fires, storms or storm warnings, such as hurricanes, which result in evacuation of the affected area, floods, washouts, explosions, breakage or accident or necessity of repairs to machinery or equipment or lines of pipe; (ii) weather related events affecting an entire geographic region, such as low temperatures which cause freezing or failure of wells or lines of pipe; (iii) interruption and/or curtailment of Firm transportation and/or storage by Transporters; (iv) acts of others such as strikes, lockouts or other industrial disturbances, riots, sabotage, insurrections or wars; and (v) governmental actions such as necessity for compliance with any court order, law, statute, ordinance, regulation, or policy having the effect of law promulgated by a governmental authority having jurisdiction. DGS and Participant shall make reasonable efforts to avoid the adverse impacts of a Force Majeure and to resolve the event or occurrence once it has occurred in order to resume performance.

Neither party shall be entitled to the benefit of the provisions of Force Majeure to the extent performance is affected by any or all of the following circumstances: (i) the curtailment of interruptible or secondary Firm transportation unless primary, in-path, Firm transportation is also curtailed; (ii) the party claiming excuse failed to remedy the condition and to resume the performance of such covenants or obligations with reasonable dispatch; or (iii) economic hardship, to include, without limitation, DGS's ability to sell Gas at a higher or more advantageous price than the Contract Price, Participant's ability to purchase Gas at a lower or more advantageous price than the Contract Price, or a regulatory agency disallowing, in whole or in part, the pass through of costs resulting from this Agreement; (iv) the loss of Participant's market(s) or Participant's inability to use or resell Gas purchased hereunder, except, in either case, as provided in this Section; or (v) the loss or failure of DGS's gas supply or depletion of reserves, except, in either case, as provided in this Section. The party claiming Force Majeure shall not be excused from its responsibility for LDC Imbalance Charges.

Notwithstanding anything to the contrary herein, the parties agree that the settlement of strikes, lockouts or other industrial disturbances shall be within the sole discretion of the party experiencing such disturbance.

The party whose performance is prevented by Force Majeure must provide Notice to the other party. Initial Notice may be given orally; however, written Notice with reasonably full particulars of the event or occurrence is required as soon as reasonably possible. Upon providing written Notice of Force Majeure to the other party, the affected party will be relieved of its obligation, from the onset of the Force Majeure event, to make or accept delivery of Gas, as applicable, to the extent and for the duration of Force Majeure, and neither party shall be deemed to have failed in such obligations to the other during such occurrence or event.

In the event Participant claims an event of Force Majeure has occurred at any of the Facility(ies), it shall advise DGS and DGS shall advise then current gas supplier. Presently, such is BP. If the then current supplier disputes the claim, Participant agrees to indemnify, defend and hold DGS harmless from any claims arising from such a dispute. DGS shall include a parallel provision in its purchase transaction with BP.

In the case of a disputed claim of Force Majeure, the volumes of gas from any special purchase during the period of the alleged period of Force Majeure will be liquidated. The funds collected from the liquidation shall be escrowed by the seller of the positions in an interest bearing account and segregated from the other funds of the seller. Any proceeds or losses from such liquidation plus interest, will be allocated as agreed by the Parties and gas supplier or in the absence of an agreement pursuant to the decision of the arbitration of the dispute over Force Majeure.

Neither party shall be responsible for delay or failures in performance resulting from acts beyond the control of and arising without the fault of the party. Such acts shall include but not be limited to acts of God, government, fire, flood, earthquake, other natural disasters, nuclear accident, strike, lockout, riot, freight embargo, or public regulated utility law or regulations imposed after the date of the signing of this Agreement.

Any party claiming Force Majeure shall advise the other party as soon as possible of the occurrence of the event and shall provide the other party with the basis of the claim, in writing, within 10 days of the occurrence of the event if practicable. DGS and the Participant shall make reasonable efforts to avoid the adverse impacts of a Force Majeure and to use its best efforts to resolve the event or occurrence once it has occurred in order to resume performance.

**8.2 Regulatory Changes:** The parties recognize that the delivery of natural gas services, including interstate and intrastate transmission services, storage, and other matters is subject to regulatory change. This paragraph is intended to specify between the parties the rights of the respective parties in the event of a change in any of the regulatory structures currently in place.

In the event that regulatory changes are implemented which in the opinion of DGS and/or its supplier will affect the terms and conditions of natural gas delivery to California and/or within California (i.e. the presently pending proposals regarding the modification of LDC transmission services and regulatory jurisdiction for provision of those services in LDC service territory), the parties agree to negotiate in good faith amendments to this Agreement in order to re-establish the same relative balance in risk and reward between DGS and Participant as is currently contemplated in this Agreement. The Participant understands that the CPUC and FERC have currently on-going

proceedings that could, during the term of this Agreement, affect the operations of the utilities and interstate pipeline companies serving California, and/or the terms and conditions of delivery of natural gas, thus potentially requiring such amendments.

- 8.3 Release:** Notwithstanding anything in this section to the contrary, in no event shall a regulatory change relieve the Participant from paying for Requirements received.

**9. Default:**

The failure of either the Participant or DGS to fulfill any duties or obligations under this Agreement or any Exhibit to this Agreement shall be an event of default. Upon occurrence of an event of default, the non-defaulting party shall give the other party a written Notice of Default. Either party shall have 25 days after receipt of such a Notice to cure the default or, if the default cannot be cured within such time, to take steps to commence to cure the default and diligently pursue such cure, provided, however, if the event of default by the Participant is a failure to make payments to DGS as specified, Participant shall have only ten (10) days to cure the default, unless specified otherwise. If upon the passage of the time specified above the defaulting party shall not have cured or commenced the cure as specified, the non-defaulting party may terminate this Agreement. If the non-defaulting party elects to terminate this Agreement, it shall so inform the defaulting party in writing pursuant to this paragraph.

A waiver of a breach or default under this Agreement shall not be deemed to waive any subsequent breach or default. The failure of a party to enforce compliance with any term or condition of this Agreement shall not constitute a waiver of such term or condition by that party.

**10. General Conditions:**

- 10.1** Except as provided in this Agreement, DGS, and the agents and employees of DGS, in the performance of this Agreement, shall act in an independent capacity and not as officers, employees, or agents of the Participant.
- 10.2** The Participant acknowledges and agrees that to the extent DGS is providing any services via contract with other parties (such as gas suppliers), DGS shall have no liability for the actions of any third party, except those actions specifically directed by DGS. However, in the event of a default or any failure by a third party, DGS shall promptly recommend suitable legal remedies to Participant and appropriate State Agencies. In the event DGS collects damages from a third party, DGS shall pay to Participant its proportionate share of such damages.
- 10.3** DGS agrees that any third party contractor with DGS shall be required by DGS to indemnify, defend and save harmless the State of California, its officers, agents and employees from any and all claims, actions, losses or judgments arising out of or in connection with services provided under this Agreement to Participant.

If the third party contractor supplying gas defaults, DGS will use its powers to claim indemnity from the gas supplier for the benefit of all Participants, if any such action is needed. Any benefits so derived will be shared with all Participants affected, on a pro-rata share basis, to the degree that they have been harmed. If DGS is not able to provide continuing gas service at the agreed upon prices and level of service, Participant shall have the option of cancellation of this Agreement, 30 days after written notice to DGS of that intention.

- 10.4** This Agreement is not assignable by DGS either in whole or in part, without the written consent of the Participant.
- 10.5** Time is of the essence in this Agreement.
- 10.6** No alterations or variations of the terms of this Agreement shall be valid unless made in writing and signed by the parties hereto, and no understanding or Agreement not incorporated herein shall be binding on any of the parties hereto.
- 10.7** **AUDIT:** The agency performing work under this Agreement agrees that the awarding department, the Department of General Services, the Bureau of State Audits, or their designated representative shall have the right to review and to copy any records and supporting documentation pertaining to the performance of this Agreement if it exceeds \$10,000. The agency performing work agrees to maintain such records for possible audit for a minimum of three (3) years after final payment, unless a longer period of record retention is stipulated.
- 10.8** This Agreement constitutes the final, complete and exclusive statement of the terms of the Agreement between the Participant and DGS as to the matters referenced and supercedes all prior and contemporaneous understandings or Agreements of the Parties.
- 10.9** If a Participant has several participant Accounts, this Agreement shall apply to all Participant Accounts that are identified in Exhibit 1. In such case, this Agreement shall be deemed to apply to each of the Participant's Accounts individually.

**10.10 Budget Contingency Clause:**

- 10.10.1** DGS and Participant understand that due to constitutional limitations pertaining to multiple-year contracts (Article XVI, Section 1), if the final official budget appropriations of any subsequent year covered under this Agreement do not appropriate funds for the procurement of natural gas by DGS ("defunding") or for the procurement of utility services for Participant ("defunding"), this Agreement shall be of no further force and effect.

If DGS is defunded, DGS shall have no liability and shall not be obligated to perform any provisions of this Agreement. If the Participant is defunded, it shall have no liability to pay any funds for natural gas delivered and DGS shall not be obligated to perform any provisions of this Agreement.

- 10.10.2** DGS and Participant understand that if the final official budget appropriations of any subsequent year covered under this Agreement does not appropriate adequate utility funds for procurement of utility services for the Participant, DGS shall have the option to reduce the quantities of natural gas purchased for and provided to Participant to the limit of the budget for utility services, with no further liability occurring to either DGS or to the Participant.
- 10.10.3** Notwithstanding the foregoing, if natural gas is used by Participant after it has been either defunded or had its funding reduced, the first gas used shall be the gas procured under this Agreement and such gas will be paid for under this Agreement on the terms and conditions specified.

**10.10.4** Participant and DGS agree that both, as to their respective budget authorizing bodies, shall use best efforts to seek continuing appropriation for utility services for all facilities that are a part of the Natural Gas Services program during the term of this Agreement.

**10.10.5** DGS and Participant represent and warrant that the provisions of this section shall not be used for business reasons relating to the purchase of natural gas under the terms of this Agreement.

**Notices to DGS:**

All notices concerning this Agreement should be sent to:

To DGS:

Marshall Clark, DGS Natural Gas Services Program Manager  
Energy Management Division  
717 K Street, Suite 409  
Sacramento CA 95814-3406

Urgent information should be communicated to the attention of one of the two following DGS program staff:

Marshall D. Clark  
NGS Program Manger  
Telephone: 916-324-1283  
FAX: 916-322-5377  
Mobile: 916-871-2025  
E-mail: [marshall.clark@dgs.ca.gov](mailto:marshall.clark@dgs.ca.gov)

Celia Torres  
NGS Customer Relations Manager  
Telephone: 916-445-6634  
Fax: 916-322-5377  
Mobile: 916-826-3759  
E-mail: [celia.torres@dgs.ca.gov](mailto:celia.torres@dgs.ca.gov)

To Participant: as specified in Exhibit 1.

IN WITNESS WHEREOF, the Participant and DGS have caused this Agreement to be duly executed by their duly authorized representatives on the date entered.

Department of General Services

Participant:

By: \_\_\_\_\_

By: \_\_\_\_\_

(name) Amy Chan

(title) Interim City Manager

Date: \_\_\_\_\_, 2004

Date: \_\_\_\_\_, 2004